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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1185

LUCY M. SLEDGE, *et al.*,
Petitioners

v.

J. P. STEVENS & CO., INC., *et al.*,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITIONERS' REPLY IN SUPPORT OF THEIR PETITION

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Petitioners file this Reply to respond to some statements of the respondent J. P. Stevens & Co., Inc., which would otherwise give a misleading impression of the case.

First, the company characterizes the prohibition on party- and counsel-initiated contacts with class members as a "limited supervision" of communications, authorized by the court's power to prohibit "false or misleading" communications. This is wholly incorrect. Petitioners had requested both the district court and the court of appeals to limit the ban to communications which were clearly improper, such as "false or misleading" communications.[1] The district court refused to limit its pro-

[1] Petitioners have lodged with the Clerk of this Court a copy of pp. 168-86 of the Supplemental Joint Appendix in the court of appeals, consisting of petitioners' September 21, 1976 Motion to Amend and Supplement the Order Concerning Back Pay Entered Herein on September 10, 1976 (pp. 168-73), their proposed Amended

hibition in this fashion, and the court of appeals affirmed the refusal.

The issue presented to this Court, therefore, is the legality of an *absolute* ban on communications initiated by the plaintiffs and by class counsel, which by its terms makes no exceptions whatsoever. The ban on communications extends with equal vigor to the provision to class members of wholly truthful information about the case, of reasonable legal advice, or even of the text of the district court's findings of fact and conclusions of law.[2]

Second, the company argues, in effect, that claim-filing requirements are so frequent and so widely accepted that they are not worth the attention of this Court. It is true that the imposition of claim-filing requirements, and/or of gag orders on class counsel, have become much more frequent in recent years. If the practice is in violation of Rule 23, of the central statutory purposes of Title VII of the Civil Rights Act of 1964, or of the Constitution, however, the fact that the practice has been popular is no barrier to review. *Cf. Int'l Bhd. of Teamsters* v. *United States*, 431 U.S. 324, 378-79 (1977) (Marshall and Brennan, JJ., concurring in part and dissenting in part).

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and Supplemental Order Concerning Back Pay (pp. 175-81), and their proposed amended form of Notice To Class Members Claiming Back Pay (pp. 182-86). The proposed amended form of Notice is also reproduced in an Appendix to this reply.

[2] The company argues that the theory underlying the ban is that petitioners and class counsel have a First Amendment right to further their associational goals by soliciting total strangers to initiate litigation, but no First Amendment right to further such goals by aiding the class members they already represent to enjoy relief after classwide discrimination has been found. Brief in opposition at 10-11. Neither court below addressed the theory underlying the ban, but the company's statement seems to be an accurate description of its operation. Whether this theory correctly applies the decisions of this Court is a matter that should be resolved by this Court

Moreover, the company has incorrectly characterized the law. It has deleted the words "intervene and" in its quotation of Rule 23(d)(2), F.R. Civ. P., to make it appear that the rule expressly authorizes nonfunctional claim-filing requirements. *Compare* brief in opposition at 12-13 *with* Rule 23(d)(2), set forth in the Petition at 6. The company's other citations are equally inapposite.[3]

Third, the company represents that the claim form ordered by the district court "is not essentially different

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[3] The company quotes the MANUAL FOR COMPLEX LITIGATION (1978) § 1.45, but the context of the quotation makes clear that the MANUAL was referring to claim-filing requirements "in cases in which the information is not otherwise available", rather than to the type of nonfunctional requirement at issue here.

Professor Moore no longer makes the same representations he made in 1969. 3B Moore's FEDERAL PRACTICE (1978) ¶ 23.55 at pp. 23-456 to 23-458 states that it is improper to bar claims at the pre-trial or trial stages because of silence by class members. Professor Moore would allow a claim filing requirement after the determination of liability, *id.* at p. 23-459, but nowhere states that he would allow such a requirement where it does not serve a necessary function.

Professors Wright and Miller do not recommended unrestrained use of claim filing requirements, *compare* brief in opposition at 14, but advocate a balancing test based on the importance of the function served by a particular filing requirement on the one hand, and the dangers of prejudice or confusion to class members on the other. 7A Wright & Miller, FEDERAL PRACTICE AND PROCEDURE (1972) § 1787 at 159-60.

Robinson v. *Union Carbide Corp.*, 544 F.2d 1258, 1260-61 (5th Cir., 1977), *cert. den.*, 434 U.S. 822 (1977), reversed the original decision of the panel, on which the company relies, and held that claim-filing requirements could be imposed only where, and when, "*necessary* for adjudication." (Emphasis in original). *Bing* v. *Roadway Express*, 485 F.2d 441, 448-49 (5th Cir., 1973), involved only a requirement that class members desiring to receive transfers to over-the-road driving jobs so indicate within a reasonable period of time. This is unexceptionable. In *Thornton* v. *East Texas Motor Freight*, 497 F.2d 416, 422-23 (6th Cir., 1974), the court expressly noted that there was no challenge to the requirement that class members file claims, but only to the form of the notice given to them.

from what the plaintiffs requested in a Motion to Amend." Brief in opposition at 13. This is both misleading and inaccurate. The dispute concerns the form of notice to be provided to class members as well as the claim form, and it is clear that petitioners' proposed amended form of Notice would be far more helpful to class members trying to make a knowing and intelligent decision than the form approved below. *Compare* the Appendix hereto *with* Pet. App. 137a-141a.[4]

Fourth, the company urges that its record is not really bad enough to justify quota relief. This is incorrect. The district court's exoneration of "management" from conscious discrimination does not apply to the foremen, overseers and personnel officials whom it found to have engaged in *subjective*—by definition, *intentional*—discrimination. *Cf.* the district court's findings 21-24, Pet. App. 69a, with respect to such officials' use of their powers to discriminate, and findings 32-59, Pet. App. 72a-78a, entitled "The Reservation of Certain Job Categories to Whites, and of Certain Others to Blacks." These findings were affirmed. Pet. App. 15a.

Another strong indication of the company's record can be obtained from an analysis of its initial assignments, in 1975, to jobs which the district court found had been racially reserved up to the time of the 1972 trial. Such tabulations were done from petitioners' exhibit 133, and were presented to the district court before it decided the propriety of quota relief. These figures were never controverted, and showed that the company's performance, three years after the trial, was still the same as before:

[4] *See also* the papers lodged with the Clerk. To the extent that the company's brief in opposition implies that petitioners did not object to the claim-filing requirement in the district court, the implication is incorrect. Motion at 1, 6.

Initial Assignments in 1975 to Jobs
the District Court Had Found To Be Racially Reserved

Jobs	Racial Reservation	Number of Vacancies Filled	Number Filled By Blacks	Percentage Filled By Blacks
Clerical	For Whites	28	1	3.6%
Loom Fixer	For Whites	23	1	4.3%
Supervisor	For Whites	34	0	0%
Weaver (males)	For Whites	30	2	6.7%
Weaver (females)	For Whites until May 1969; integrated therafter	108	56	51.9%
Warehouseman	For Blacks	13	12	92.3%

Petitioners then analyzed the company's applicant/hire ratios for each race in the three years from the end of trial in 1972 until December 31, 1975. The statistics showing that the company had not improved its record are set forth in the Petition at 13, note 12. These figures, too, were uncontroverted.

The company's labor-force statistics were proven inaccurate in the proceedings on relief, and have been rejected by both courts below. Pet. App. 12a, note 16.

Fifth, the company attempts to portray the hiring quota ordered by the district court as unworkable, by presenting hypothetical situations which could never occur in reality. Brief in opposition at 5-6. The company hires approximately one thousand employees a year at these plants, and has a large-volume applicant flow there which is consistently in a range from 55% to 70% black. (Plaintiffs' exhibit 133; findings 25-28, Pet. App. 70a-71a). Given that the evidence of record shows that the defendant has clung to its old ways in the years after the trial, this case presents the question whether the district court abused its discretion by ordering, in a

workable and reasonable manner,[5] that blacks be hired at the same rate as whites.

Sixth, the company argues that the departmental seniority issue is virtually moot. Brief in opposition at 16-17. This is incorrect. Departmental seniority is still in force at the plants involved in this suit, and collective bargaining cannot be relied upon to end it.[6] Even if it were ended prospectively, the legality of the company's seniority system would be important to the adjudication of the back pay claims of class members whose original departmental assignments to low-paying departments were outside the period of limitations, and which were perpetuated by the company's requirement that seniority be forfeited upon transferring departments.

CONCLUSION

Review of the questions raised in the Petition is appropriate at this time. This is particularly true for the questions involving the claim-filing requirement and the ban on communications with class members.

After the conclusion of back-pay proceedings, it is highly doubtful that the district court would relax the ban on communications and allow petitioners to contact nonfiling class members to determine the reasons for their failure to file. It is also highly doubtful that the district court would schedule evidentiary hearings, at the end of the case, to allow petitioners to compile a record demonstrating the prejudice caused by the procedures

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[5] The court of appeals did not base its reversal of quota relief on any perceived problems of workability, and held generally that such problems should be presented to the district court if in fact they ever materialize. Pet. App. at 31a.

[6] The union was certified in 1974, but has not yet been able to obtain a contract. The company has recently been found to have failed to bargain in good faith. *J. P. Stevens & Co., Inc.*, 239 NLRB No. 95 (1978) (review pending).

here drawn in question. By their nature, an actual demonstration of the prejudice they cause will forever lie beyond petitioners' grasp. If the questions raised by petitioners are to be resolved by this Court, they should be resolved in the present posture of this case.

Petitioners pray that their Petition be granted.

Respectfully submitted,

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March 1979

APPENDIX

[Caption Omitted]

TO: ALL BLACK PERSONS WHO APPLIED FOR JOBS AT THE ROANOKE RAPIDS PLANTS AND OFFICES OF J. P. STEVENS & CO., OR WHO WORKED THERE, ON OR AFTER OCTOBER 2, 1967

The purpose of this Notice is to describe the matters involved in this racial discrimination case against the company, and to state what present and former black applicants and employees must do to protect any rights they may have to an award of monetary relief ("back pay") in this case.

NOTICE IS HEREBY GIVEN THAT:

A. *Description of the Case*

On October 2, 1970 a civil action was filed in the United States District Court at Raleigh by Reginald Harrison, Lucy Sledge and others as plaintiffs against J. P. Stevens & Co., Inc., as defendant, seeking relief under Title VII of the Civil Rights Act of 1964. This law prohibits, among other things, discrimination in employment on the grounds of race or color. During the pendency of the action the plaintiff Harrison withdrew from the suit, and it was thereafter prosecuted by Lucy Sledge and eleven other named individuals under the title as shown above on behalf of themselves and members of a class defined by an order of the Court as follows:

> "(a) All Negroes employed at all the Roanoke Rapids plants of J. P. Stevens & Company, Inc., on and after October 2, 1967; and
>
> "(b) All Negroes who have applied for employment at said Roanoke Rapids plants since October 2, 1967, who claim to have been affected by the

alleged racially discriminatory employment practices of the defendant."

On December 22, 1975, after a full trial, the United States District Court in Raleigh decided that the company had discriminated against black applicants and employees in the following ways:

a) *Hiring*: Although qualifications play a minor role in the defendant's hiring process and there is no evidence to show that blacks do more poorly than whites on the rudimentary pre-employment tests administered by the company, it hires a substantially higher percentage of white applicants for employment than of black applicants.

b) *Delaying the Hiring of Black Females*: Black females are discriminated against in having to wait longer than white employees from the date of their first application to the date of their hire.

c) *Lack of Standards for Making Personnel Decisions*: The company's failure to establish objective, formal guidelines for hiring, promotion and transfer within its plants is discriminatory.

d) *Reliance on the Opinions of Supervisors When Making Personnel Decisions*: The company's policy of relying almost exclusively upon subjective conclusions of its all-white overseers and personnel officials in hiring and promotion is discriminatory.

e) *Clerical and Supervisory Jobs*: The defendant has reserved its clerical jobs and substantially all of its supervisory jobs for whites.

f) *Weaver and Fixer Jobs*: The jobs of weaver and fixer, which are relatively high-paying jobs, were reserved almost exclusively for whites prior to May of 1969, and discrimination against black males in assignments to these jobs has continued.

g) *Warehouseman Jobs*: The defendant has reserved the comparatively low-paying job of warehouseman for blacks.

h) *Blacks are Assigned to Lower-Paid Jobs*: The average black male hourly employee of defendant is paid substantially less per hour than the average white male hourly employee and the differences generally became larger in the period between 1967 and the time of the trial. The company has assigned a smaller proportion of black women than of white women to its highest-paid jobs for women. These findings are true, regardless of the education, previous employment experience, or seniority of the employees in question.

i) *Blacks are Initially Assigned to Lower-Paid Departments*: Newly-hired black males are assigned more frequently than whites to lower-paying departments.

j) *Failure to Post Notices of Job Vacancies*: One of the reasons blacks have remained in lower-paid jobs than whites was the company's failure to post notices of job vacancies. Because of this, many employees did not know when vacancies in higher-paying jobs came open in their own departments or in other departments, and were unable to request that they be considered for such vacancies.

k) *Departmental Seniority*: The company's departmental seniority system is discriminatory in that an employee who changes departments loses departmental seniority in his or her old department and thus runs a greater risk of lay-off by transferring than he would by remaining in his old department. This discourages transfers between departments, and a black male discriminatorily assigned to a low-paid department suffers reduced opportunities for

a good paying job after his original discriminatory departmental assignment.

1) *Layoffs and Recalls*: Blacks are discriminated against in layoffs and recalls.

The Court has now issued a Decree which has permanently enjoined the defendant, J. P. Stevens & Co., Inc., from engaging in any act or practice which has the purpose or effect of discrimination against any individual, whether employee or applicant for employment, because of his or her race, at any of its facilities in and around Roanoke Rapids, North Carolina. The company still denies that it has discriminated, and has appealed the Court's entry of the Decree to the United States Court of Appeals in Richmond.

This Notice has been issued because the lawsuit is now moving into the "back pay" stage, in which the Court must decide which black applicants and employees, who applied or were employed on or after October 2, 1967, are entitled to monetary awards and the amounts to which they may be entitled. The purpose of this Notice is to tell such black applicants and employees what is involved and how to press any rights to monetary relief they may have.

B. *Protection of Rights to Monetary Relief*

If you want to preserve whatever rights you may have to a back pay award in this case, you must write the Clerk of the United States District Court in Raleigh and state that you want to be considered for a back pay award and that you are willing to come to Court and testify about the claim if you are asked to do so. (The hearings would probably be held in Roanoke Rapids, but the Court may arrange for them at some other place.) Your name, address and telephone number (if any) must be stated. If the Clerk does not receive your statement within 30 days after this Notice is first published in the Roanoke

Rapids *Herald*, you will lose whatever right to an award of back pay you may have had in this case. If a class member proves that he or she did not learn of this Notice in time to file a statement by the deadline, and notifies the Clerk of this problem within a reasonable time after the deadline, an exception may be granted. The name and address of the Clerk are stated at the bottom of this Notice, and each letter or card must state the name of this case: *Sledge* v. *J.P. Stevens & Co.*

Persons who receive this Notice by mail can make this statement by filling out and mailing the postcard which is enclosed with the Notice. For present and former black applicants and employees who read about this Notice in the local newspaper, postcards can be obtained at the company's Personnel Office and at the Textile Workers' Union Hall in Roanoke Rapids.

If you believe that the company treated you differently than it treated whites, and that as a result you have lost earnings you would otherwise have had, you may have a back pay claim. Some examples of possible claims are:

a) If you applied for a job and were not hired, at a time when whites were being hired.

b) If you applied for a job and were hired after a long delay, at a time when whites were being hired without long delays.

c) If you were hired and assigned to a low-paying job, at a time when whites were being assigned to higher-paying jobs.

d) If you were assigned to a predominantly-black department, at a time when whites were being asigned to better-paying departments.

e) If you were not given a promotion to a better-paying job, at a time when whites were being hired or promoted into better-paying jobs.

f) If you changed departments, lost seniority, and the lost seniority hurt your chances of getting a promotion.

g) If you changed departments, lost seniority, and the lost seniority resulted in your being laid off sooner, or recalled later, than you would have been laid off or recalled if you had kept your seniority.

h) If you were treated differently than whites in any other way, and the different treatment made your earnings less than they would otherwise have been.

If you believe that you may have a back pay claim, you must then decide for yourself whether you want to drop it, or go ahead with it.

It is not necessary to know all of the facts about your claim before sending in the statement to the Clerk of Court. Many facts taken from the company's personnel records and pay records are already before the Court, and the lawyers for the plaintiffs will help investigate the facts of every claim which is raised in this case.

It is possible that you may have a legally valid back pay claim but not know it because you don't have personal knowledge of all of the relevant facts. If you send the statement to the Clerk of Court, this will preserve whatever rights you may have, and the attorneys for the plaintiffs will then help investigate your situation and press any back pay claim you may have.

It is not necessary to hire a lawyer in order to send in this postcard or to press a back pay claim against the company in this case. If you submit the statement to the Clerk of Court, you will automatically be represented by the attorneys for the plaintiffs, without charge to you. They are:

Richard T. Seymour
316 Southern Building
1425 H Street, N.W.
Washington, D.C. 20006

T. T. Clayton
Clayton & Ballance
307 West Franklin Street
Warrenton, North Carolina 27589

You may contact them if you have any questions. If you prefer, you may retain your own lawyer to represent you with respect to your back pay claim.

If you are the relative of a class member who is deceased, or are the executor, administrator or residual beneficiary of the estate of a deceased class member, you may be able to press the back pay claim of the deceased class member. If you desire to do so, the statement should state the name of the deceased class member, the fact that he or she is deceased, and your name and address.

Finally, you should know that the law prohibits the defendant from taking any action against you for filing a statement with the Clerk or for pressing a back pay claim against the company.

Please save this Notice for future reference. If you know of any present or former black applicant or employee who is within the Court's definition of the class but who did not receive this Notice, please bring it to his or her attention.

Dated:

Street Address:

7th Floor, Federal Building
310 Bern Avenue
Raleigh, North Carolina 27611

JOHN R. WHITTY, Clerk
United States District Court
P.O. Box 25670
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